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Nos. 94-830 and 94-831

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In the Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THERMON PHILLIPS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 302(a) of the Labor Management Relations Act, 29 U.S.C. 186(a), prohibits an employer from retroactively granting full-time union officials who are former employees indefinite leaves of absence to earn credits toward pension eligibility.

2. Whether Section 302(d)(2), which makes it a felony to violate Section 302(a) "willfully," requires proof that a defendant acted with the specific intent to do something that the law forbids.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 19 F.3d 1565.[1]

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-830.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 41a-42a. The petitions for a writ of certiorari were filed on November 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioners Phillips, Rich, and USX Corporation (USX) were convicted of conspiracy to violate the Labor Management Relations Act (LMRA or Act), 29 U.S.C. 186, in violation of 18 U.S.C. 371. In addition, petitioners Rich and Phillips were convicted of receiving illegal benefits from an employer, in violation of 29 U.S.C. 186(b)(1). Petitioner USX was convicted on two counts of paying illegal benefits to employee representatives, in violation of 29 U.S.C. 186(a)(1); ten counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of failure to notify potential beneficiaries of a change in their pension plan, in violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1131. Petitioner USX was fined $4,105,000 and ordered to pay $290,000 in restitution to the United States Steel and Carnegie Pension Fund. Petitioner Rich was sentenced to 36 months' imprisonment, to be followed by three years' supervised release, and fined $6,000. Petitioner Phillips was sentenced to 30 months' imprisonment, to be followed by two years' supervised release, and fined $6,000. C.A. App. Tabs 4-6.

1. Petitioner USX owns and operates steel mills throughout the United States. The steel workers in the

mills are represented by the United Steelworkers of America, International Union (Union), which every three years negotiates a basic collective bargaining agreement with USX that governs the rates of pay, including pension benefits, of the steel workers. The Union is divided into districts. After the basic agreement is reached, the Union's district directors and subdistrict directors negotiate local collective bargaining agreements with USX that govern working conditions at the steel mills within their districts. Pet. App. 2a-3a.

USX's Fairfield Steel Mill (Fairfield) in Birmingham, Alabama, was located in District 36. In 1983, petitioners Phillips and Rich were the district director and subdistrict director, respectively, of District 36. Phillips and Rich were full-time Union employees. Phillips had worked for USX from 1948 to 1951, and Rich had worked for USX from 1949 to 1964. When Phillips and Rich left USX's employment, the basic agreement provided that a worker who left USX to become a Union employee could request a one-year leave of absence. If USX granted the request, the worker would continue to accrue, for pension purposes, continuous service credits for that year. USX could extend the leave of absence for an additional year, but the basic agreement limited such leaves to two consecutive years. To maintain his pension eligibility, a worker who left USX to accept Union employment had to return to USX before his leave of absence expired. Since Phillips and Rich did not return to USX after accepting Union employment, they were not eligible for pensions. Pet. App. 3a-4a.

In September 1983, six months after USX and the Union had reached a basic agreement, Phillips and Rich began negotiating a local collective bargaining agreement on behalf of the ten Union locals at Fairfield with

William Miller, the USX vice president for labor relations. At that time, Fairfield and several other USX steel mills were idle due to depressed market conditions. USX was not willing to resume production at those mills unless the locals agreed to a permanent reduction in the work force, the elimination of incentive pay, and the discontinuation of certain restrictive work practices. Pet. App. 3a. For their part, Phillips and Rich decided to condition any local agreement on USX's willingness to award them and seven other Union employees sufficient retroactive "continuous service" credits to allow them to retire and to receive a pension from USX. *Id.* at 3a, 5a.

The negotiations over the local agreement involved several meetings over the course of four months. At the first meeting, Phillips and Rich told Miller that the Union wanted the basic agreement amended to authorize the granting of unlimited leaves of absence for workers who wished to leave USX to accept Union employment. Miller responded that USX would not agree to such an amendment. At the second meeting, Rich took Miller aside and told him, "[Y]ou accommodate us and we'll accommodate you." Rich then handed Miller a proposal extending the leaves of absence of Phillips, Rich, and the other seven Union employees "for an indefinite period of time until such person dies or takes pension." Miller sent the proposal to J. Bruce Johnston, the USX executive vice president for employee relations, who consulted with David Roderick, the chief executive officer and chairman of the board of USX. Johnston instructed Miller to reject the proposal. Following another meeting in October 1983, Phillips and Rich told Miller that there would be no local agreement with Fairfield until USX authorized the pensions. Miller responded that USX knew of no way to pay the pensions. Pet. App. 3a, 5a-7a.

In the meantime, USX was demanding concessions similar to those demanded of Fairfield in the negotiations of local agreements with other Union district directors. When the Union refused to grant the concessions, all negotiations ceased in mid-November 1983. Miller, however, continued to communicate with Phillips and Rich. At a meeting on December 23, 1983, Miller told Roderick and Johnston that one of the items still "on the table" at Fairfield was the pensions for Phillips, Rich, and the seven other Union employees. Johnston instructed Miller to reopen the negotiations with Phillips and Rich. Pet. App. 7a.

On December 24, 1983, Miller met Phillips and Rich in Birmingham, and they negotiated a local agreement for Fairfield. Phillips and Rich nevertheless refused to sign the agreement because USX had not agreed to authorize the pensions. Miller called Johnston, who instructed Miller to tell Phillips and Rich that USX would consider their request for retroactive leaves of absence on certain conditions. When Miller relayed the conditions, Phillips and Rich asked Miller whether he believed that USX would grant the pensions. Miller answered that USX would favorably consider the matter. Phillips and Rich then signed the local agreement, which called for a reduction in the work force at Fairfield, reductions in the incentive pay of the mill's workers, and the elimination of the work practices disliked by USX. Shortly afterwards, USX resumed steel production at Fairfield and permanently closed several other plants. Pet. App. 7a-9a; Gov't C.A. Br. 23-24.

In July 1984, several workers at Fairfield filed grievances against USX challenging its interpretation of the local agreement. Phillips and Rich, as the local Union officials, were responsible for determining

whether the grievances would be prosecuted and, if they were not resolved, whether to demand arbitration. When Johnston learned of the grievances, he contacted Miller. On Johnston's instructions, Miller told Phillips and Rich that USX would grant their pensions. The grievances were subsequently withdrawn. Pet. App. 9a.

Shortly thereafter, Johnston drafted an amendment to the basic agreement's leave of absence provision. He did not submit it to the Union because he was advised that the Union members at Fairfield might learn of the amendment and conclude that Phillips and Rich had betrayed them. Instead, Johnston decided to have USX's Corporate Policy Committee, on which he and Roderick served, authorize the pensions that Phillips and Rich sought. Pet. App. 9a-10a.

On October 22, 1984, Johnston submitted to the Corporate Policy Committee a two-part proposal that was adopted the same day. First, the proposal amended the USX Personnel Manual to allow the Committee, in its discretion, to grant leaves of absences for periods in excess of two years to workers who left USX's employment to work for the Union. Second, the proposal granted retroactive leaves of absence to former employees who had left USX's employment to work for the Union and who had lost their right to a USX pension because they had exhausted their leaves of absences. Pet. App. 10a-13a.

Johnston also prepared and signed a standard company form that both recommended and authorized pensions for Phillips, Rich, and four of the Union employees on their list.[2] Johnston backdated the form to January 1, 1984,

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[2] In fact, only Rich met the requirements of the second part of the proposal that was approved by the Corporate Policy

and indicated that the pensions would be effective March 1, 1984. When the form arrived at the employee benefits office at Fairfield, the benefits office questioned its propriety because it had not been prepared in accordance with USX's standard procedure. After the office supervisor called his superior at USX headquarters, he instructed the benefits office to "keep the matter quiet." Although the form prepared by Johnston was not entered into the record system, the employee benefits office at Fairfield certified to the United States Steel and Carnegie Pension Fund, Inc. (the Administrator), that Phillips, Rich, and the other four Union employees were eligible for pensions. Pet. App. 13a-14a.

Shortly thereafter, Rich and the other four Union employees signed pension applications indicating that they had retired from USX effective March 1, 1984. One of the Union employees also signed a pension application on behalf of Phillips, who was in Florida at the time. The Administrator finished processing the applications on November 19, 1984, and began mailing pension checks on December 1, 1984. Phillips received a total of $55,319, and Rich received $48,318. Although receiving the pensions violated the Union's rules, Phillips, Rich, and the other four Union employees continued to work for the Union. Pet. App. 14a-15a.

Committee. Phillips did not satisfy the requirements because he had left USX to work for another union, and the other four Union employees did not qualify because they had not continuously served bargaining units at the USX division where they had been employed. Pet. App. 15a. Moreover, although more than 50 other Union employees became eligible for pensions under the second part of Johnston's proposal, neither Johnston nor anyone else at USX made any effort to identify the potential pensioners or to include their names on the authorization form. *Id.* at 12a, 14a n.11.

Under an earlier contract, USX had undertaken some of the duties imposed on the Administrator by ERISA, including the duty to notify the Department of Labor and the participants in the pension plan of any material changes to the plan. See 29 U.S.C. 1021(a)(1), 1022(a)(1), 1024(a)(1)(D). The Corporate Policy Committee's adoption of Johnston's proposal constituted a material change in the pension plan because the second part of the proposal created a new class of beneficiaries. USX did not notify the Department of Labor or the pension plan's participants of the new class of beneficiaries created by the adoption of Johnston's proposal. Pet. App. 15a-16a.

2. The grand jury charged that the retroactive leaves of absence granted to Phillips and Rich violated 29 U.S.C. 186(a)(1), which prohibits any employer from giving anything of value "to any representative of any of his employees who are employed in an industry affecting commerce." Petitioners argued that the leaves of absence did not violate the LMRA because they fell within an exception provided in 29 U.S.C. 186(c)(1), which exempts from the Act's prohibition benefits given by an employer to a union official "who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer."[3] Over petitioners' objections, the district

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[3] Section 302 of the Labor Management Relations Act, 29 U.S.C. 186, provides in pertinent part:

> **(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**
>
> It shall be unlawful for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

court instructed the jury that the exception in 29 U.S.C. 186(c)(1) applies "only to payments by an employer to former employees for past services actually rendered by those former employees while they were employees of the employer company." Pet. App. 19a.

The district court also rejected petitioners' argument that 29 U.S.C. 186(d)(2), which provides that any person who "willfully violates" 29 U.S.C. 186 is guilty of a criminal offense, required the government to prove that they acted with the specific intent to violate the law.[4] Over petitioners' objections, the court instructed the jury that "the Government is not required to prove that

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(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]

* * * * *

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]

[4] 29 U.S.C. 186(d)(2) provides in part that, "[e]xcept for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony."

the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with intent to violate the law or with knowledge that the law would be or was violated." 94-831 Pet. App. 41a. In addition, the court charged the jury as follows:

> The word ["]wilfully["] means that the person or entity charged as a defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidentally or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as [a] computer error, such USX Corporation act would not be intentional and thus would not be wilful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent, then that act would be wilful.

Id. at 42a.

3. The court of appeals affirmed. Pet. App. 1a-40a. It ruled that the district court correctly instructed the jury on the scope of the exception provided in 29 U.S.C. 186(c)(1). Pet. App. 18a-23a. The court rejected petitioners' claim that payments given "by reason of" service as a former employee need not be for past services actually rendered by former employees while they were employees to fall within Section 186(c)(1)'s exception. "Because section 186(c)(1) only excepts payments given 'as compensation for' or 'by reason of' an employee's 'service as an employee,'" the court reasoned that "a payment given to a *former* employee must be for

services he rendered *while he was an employee* to qualify for the exception." Pet. App. 21a.

The court of appeals also rejected petitioners' claim that the government was required to prove that they acted with the specific intent to violate 29 U.S.C. 186. Instead, the court held that the term "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. Pet. App. 23a-37a. The court pointed out that, "in some contexts, courts have interpreted 'willfully' as requiring a finding of general intent, meaning the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidentally or mistakenly." *Id.* at 24a. The court relied principally on the statutory framework of Section 186, and especially Section 186(d)(1), which indicates that, when Congress required proof of specific intent, it did not rely solely on the word "willfully" but employed additional language to impose that requirement.[5] See Pet. App. 29a-34a.

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[5] 29 U.S.C. 186(d)(1) provides in part:

> Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, *and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9)* violates this subsection, shall, upon conviction thereof, be guilty of a felony * * * ; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed

The court also noted that four courts of appeals had construed Section 186(d) to require only general intent before Congress amended Section 186(d) in 1984 to create separate subsections (d)(1) and (d)(2). The amendment retained the term "willfully" in both subsections but established a specific intent requirement for prosecutions under subsection (d)(1). Pet. App. 34a-35a & n.27. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." Pet. App. 34a-35a.[6]

ARGUMENT

1. Petitioner USX contends (Pet. 8-14) that the retroactive credits and pensions that it gave to Phillips and Rich did not violate 29 U.S.C. 186(a), because those payments were sheltered under 29 U.S.C. 186(c)(1) as payments given "by reason of" the former employees' "service as an employee." That contention does not warrant this Court's review.

Section 186 "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." Pet. App. 18a. "It is fairly universally acknowledged that a central purpose of [Section 186] as a whole [is] to prevent employers from bribing union officials." *Toth* v. *USX Corp.*, 883 F.2d 1297, 1300 (7th Cir.), cert. denied, 493 U.S. 994 (1989); see

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$1,000, such person shall be guilty of a misdemeanor[.] [Emphasis added.]

[6] The court of appeals likewise rejected USX's argument that the district court erroneously instructed the jury that proof of only general intent was required to establish that USX "willfully" violated ERISA, 29 U.S.C. 1131. Pet. App. 37a-40a.

also *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). Section 186(a) thus prohibits employers from paying anything of value to employees' representatives or union officials, and Section 186(b), in turn, prohibits those representatives and officials from receiving such payments.

The narrow exception provided in Section 186(c)(1) states that Sections 186(a) and (b) are not applicable "in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." Because Section 186(c)(1) excepts only payments given "as compensation for" or "by reason of" an employee's "service as an employee,"[7] the court of appeals correctly held that the retroactive payments given to Phillips and Rich were not covered by the exception, for those payments had no relation to any "service" that they rendered when they were USX employees. See Pet. App. 21a-22a.

Contrary to petitioner USX's argument (Pet. 9-13), the court of appeals' decision in this case does not conflict with the decision of any other court of appeals. In *Trailways Lines* v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101, cert. denied, 479 U.S. 932 (1986), the Third Circuit ruled that a provision in a collective bargaining agreement granting employees leaves of absence to work for a union while accumulating pension credits with the company did not

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[7] Petitioners conceded in the court of appeals that the pension payments in this case were not given "as compensation for" the past service of Phillips and Rich as USX employees. Pet. App. 19a-20a.

fall within the Section 186(c)(1) exception. 785 F.2d at 104-108. In rejecting the claim that the arrangement qualified for the exception because it was offered "by reason of" the former employees' service to Trailways, the Third Circuit found that "[a] logical reading of the statute makes clear that [Section 186(c)(1)] applies solely to payments made as 'compensation [for] or by reason of' the former employees' *past* service to the employer." *Id.* at 106. The Third Circuit concluded that Section 186(c)(1) "contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.*" *Ibid.*

In *Toth* v. *USX Corporation*, 883 F.2d 1297, cert. denied, 493 U.S. 994 (1989), the Seventh Circuit considered the leave of absence policy at issue in this case, in the context of a civil action brought by union representatives who were former USX employees and were denied benefits when USX rescinded the policy. The court held that the policy violated Section 186. 883 F.2d at 1300-1306.[8] As petitioner USX points out (Pet. 11), the Seventh Circuit in *Toth* questioned part of the Third Circuit's reading of the language of Section 186(c)(1) in *Trailways*. In particular, the Seventh Circuit suggested that an employer might permissibly make payments under Section 186(c)(1) to former employees, as well as current employees, "as long as the payments are in some way motivated by past service." 883 F.2d at 1304. The Seventh Circuit reasoned that continuing payments to former employees might

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[8] In *Toth*, petitioner USX argued, contrary to its position in this case, that the leave of absence policy violated Section 186. See 883 F.2d at 1300.

constitute permissible payments "by reason of" past service when those continuing payments were embodied in a collective bargaining agreement, as, for example, when an employee leaves the employer's service temporarily but continues to accrue benefits provided for in the agreement. See *id.* at 1304-1305. The Seventh Circuit stressed, however, that "collective bargaining and inclusion [of the payments] in a generally disseminated collective bargaining agreement, whose terms are uniformly applicable and nondiscriminatory, [would be] crucial." *Id.* at 1304. The Seventh Circuit ultimately concluded that USX's policy could not qualify as "compensation for or by reason of" former employment because, unlike the policy in *Trailways*, USX's leave policy was not a part of a bargained-for labor agreement. *Ibid.*

In light of the decisions in *Trailways* and *Toth*, it is clear that the outcome of this case would not have been different in either the Third Circuit or the Seventh Circuit. Under the Seventh Circuit's reading of Section 186(c)(1), the payments in this case were illegal because they were not "part of the bargained-for collective bargaining agreement" that set the terms of compensation for all the employees in the bargaining unit. *Toth*, 883 F.2d at 1305. The Third Circuit's reading of the exception in Section 186(c)(1) is even narrower than the Seventh Circuit's construction; the Third Circuit would hold that the payments in this case were illegal because they were not directly attributable to past services actually rendered by Phillips and Rich while they were employees of USX. See *Trailways*, 785 F.2d at 106.

While the Third Circuit does not appear to share the Seventh Circuit's view that the exception in Section

186(c)(1) may cover pension credits accumulated by union officials during leaves of absence from their former employer that accrued pursuant to provisions of a collective bargaining agreement, the question whether Section 186(c)(1) covers such credits is not presented in this case. Phillips and Rich were not granted their retroactive leaves of absence to earn pension credits pursuant to a collective bargaining agreement; rather, they obtained the credits under a private arrangement with USX, which USX sought to conceal from the union membership to avoid the perception that Phillips and Rich had betrayed union members. Pet. App. 9a-10a. Likewise, petitioners are not helped by cases involving fringe benefits offered, pursuant to a collective bargaining agreement, to employees on temporary leaves of absence from an employer as well as current employees,[9] or cases in which employers, under such agreements, allow currently employed union officials time off with pay for the purpose of conducting union-related business.[10] No court of appeals that has addressed the scope of Section 186(c)(1) would have found

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[9] The district court case cited by petitioner USX (Pet. 11) therefore does not support its interpretation of Section 186(c)(1). In *Communications Workers of America* v. *Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416, 419-423 (D.D.C. 1987), the court held only that provisions in collective bargaining agreements permitting employees to take unpaid leaves of absence for union business without losing fringe benefits fell within the exception provided in Section 186(c)(1). In reaching that conclusion, the court reasoned that the terms of employment for which unions bargain (including the possibility of unpaid leave) should be considered part of the compensation for which employees work. 670 F. Supp. at 419-420; accord *Toth*, 883 F.2d at 1304.

[10] See *BASF Wyandotte Corp.* v. *Local 227, International Chemical Workers Union*, 791 F.2d 1046, 1048-1051 (2d Cir. 1986).

the payments in this case to be lawful, and this case does not implicate any broad-ranging policy issues regarding the scope of the Section 186(c)(1) exemption.[11]

2. Petitioners contend (94-830 Pet. 14-19; 94-831 Pet. 9-24) that the government was required to prove that they acted with specific intent to violate the law to establish that they "willfully" violated 29 U.S.C. 186. That contention also does not warrant this Court's review.

a. Contrary to the individual petitioners' contention (Pet. 12-15), this Court did not hold, in *Ratzlaf* v. *United*

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[11] Petitioners Phillips and Rich rely (Pet. 7) on a 1977 letter from the Department of Labor as support for their assertion that the continued accrual of pension credits while an employee is on a leave of absence and working as a union official was thought to be permissible. That letter, however, specifically disclaimed any authority on the part of the Labor Department to "provide a definitive opinion as to whether a violation would occur in connection with the situation described," and it addressed the issue only "[i]n the abstract." Moreover, the letter concerned an employee who was "on a leave of absence without pay from a company to serve as a union officer," not (as in this case) former employees who sought to be placed on unpaid leave retroactively. Moreover, in a 1979 letter, the Department of Labor concluded that a "former employee" who was "on leave" from the employer and working for a union could not be "placed back" in the employer's pension plan, because of the strictures of Section 186. The Department expressed the view that "the payment by a company into a pension plan for an employee of the labor organization * * * who renders no service to the company" would violate Section 186. That situation more closely resembles this case.

Likewise, the 1980 Department of Labor report relied on by USX (Pet. 9), which surveyed unpaid leave arrangements embodied in collective bargaining agreements, has no relevance to this case, which does not involve any provision of a collective bargaining agreement.

States, 114 S. Ct. 655 (1994), that the use of the term "willfully violates" in every criminal statute requires proof of specific intent.[12] In *Ratzlaf*, the Court construed the term "willfully" in 31 U.S.C. 5322(a), the criminal enforcement provision for the prohibition in 31 U.S.C. 5324 against structuring currency transactions for the purpose of evading a financial institution's reporting requirement. Although the Court held that Section 5322(a) required proof that the defendant acted with knowledge that the structuring in which he engaged was unlawful, 114 S. Ct. at 663, the Court emphasized that "willfully" is "a 'word of many meanings,' and 'its construction [is] often * * * influenced by its context.'" *Id.* at 659 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)); see also *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion); *United States* v. *Murdock*, 290 U.S. 389, 395 (1933).

"[I]n many contexts, * * * 'willfully' refers to consciousness of the act but not consciousness that the act is unlawful." *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in the judgment). In this case, the court of appeals correctly held that "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. The criminal enforcement provision of Section 186 is set forth in subsection (d). Before subsection (d) was amended in 1984, it provided that "[a]ny person who willfully violates any of the provisions of * * * section [186] shall * * * be guilty of a misdemeanor." 29 U.S.C. 186(d) (1982). When Congress amended subsection (d) in

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[12] Indeed, neither the individual petitioners nor USX takes issue with that portion of the court of appeals' opinion (Pet. App. 37a-40a) holding that ERISA's criminal enforcement provision, 29 U.S.C. 1131, which employs the phrase "willfully violates," requires only proof of general intent.

1984 to make some violations of Section 186 felonies, it also divided subsection (d) into two parts. Subsection (d)(1) applies to payments that are illegal because they do not satisfy certain technical requirements of subsections (c)(4)-(9). For those violations, 29 U.S.C. 186(d)(1) requires proof that the person participating in the payment acted "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." Subsection (d)(2) applies to all other illegal payments that are not covered by subsection (d)(1), *i.e.*, payments prohibited by subsections (a) and (b) for which Congress did not provide any exception in subsection (c). For those violations, subsection (d)(2) requires proof only that the parties participating in the payment "willfully violate[d] this section."

In light of that statutory structure, the court of appeals correctly found that "Congress had to have intended the term 'willfully' as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise the [additional] 'intent to benefit' language in section 186(d)(1) would be superfluous, because a person who had the specific intent to violate [Section 186] would also necessarily intend to benefit himself or to influence a union official." Pet. App. 31a-32a. As the court explained, under petitioners' interpretation, the additional intent requirement of Section 186(d)(1) would serve little or no purpose, for it would exclude from the reach of criminal liability only those "payments made with the specific intent to violate the law, but without the intent to benefit himself or influence the recipient." *Id* at 32a.[13]

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[13] Petitioners Phillips and Rich assert (Pet. 19-20) that the court of appeals' reasoning is "specious" because an employer and

In addition, as the court of appeals explained (Pet. App. 32a-33a), other aspects of the statutory scheme confirm that the term "willfully" requires proof only of general intent. The criminal enforcement provision applicable to Section 186 prohibits payments if the employer acts "willfully," yet Sections 186(a)(3) and 186(a)(4) bar payments by an employer only if the employer also acts with an "intent to influence" the recipient. Given that the "intent to influence" language applies only to subections (a)(3) and (a)(4), the court of appeals concluded that "Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence." Pet. App. 33a. But it would be "nonsensical" to suppose that Congress intended to create a criminal prohibition that applied to "payments made to employee representatives without any intent to influence but with specific intent

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union may knowingly violate the technical requirements of subsections (c)(4)-(9) without having any intent to confer an improper benefit on anyone. But, as the court of appeals observed (Pet. App. 32a), it is doubtful that such a "scenario could actually occur, let alone [that] Congress intended such an absurd statutory scheme." In the absence of an intent to obtain or confer an improper benefit, there appears to be no reason for anyone who knows about the technical requirements of subsections (c)(4)-(9) to disregard them, and petitioners offer none. Moreover, it is highly unlikely that Congress added the intent-to-benefit requirement to subsection (d)(1) to protect from criminal prosecution those persons who knowingly disobeyed the law, but who did not intend to reap any personal benefit. Rather, Congress sought, in subsection (d)(1), to exempt from criminal prosecution those persons who committed acts that contravened subsections (c)(4)-(9), but who did not intend to benefit someone prohibited by the statute from receiving things of value and did not know that the intended beneficiary was prohibited from receiving things of value, *i.e.*, persons acting only with general intent.

to violate the law." *Ibid.* In sum, "[t]he double enforcement provision in section 186(d) and the dual structure of prohibited payments in section 186(a) suggest that Congress intended the term 'willfully' to require proof only that the payment was made knowingly and intentionally, not accidentally or by some mistake." *Id.* at 34a.

b. The court of appeals also noted that, "[w]hen Congress amended Section 186(d) in 1984, it made no attempt to change the clear majority rule [in the courts of appeals] that 'willfully' required a finding of only general intent." Pet. App. 34a. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2)," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." *Id.* at 34a-35a. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

The court of appeals' analysis is supported by the legislative history of the 1984 amendments to Section 186. The amendments were enacted as part of Chapter VIII of the Comprehensive Crime Control Act of 1984, and were identical to amendments contained in a labor-racketeering bill passed by the Senate in 1983.[14] The Senate committee reports accompanying the 1984 Act and the 1983 bill indicate that Congress included the "intent to benefit" language in Section 186(d)(1) precisely because it was concerned that "willfully" carried the connotation of general intent, and that a

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[14] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 801, 98 Stat. 2131; S. Rep. No. 225, 98th Cong., 1st Sess. 297 & n.1 (1983); cf. 129 Cong. Rec. 16,367, 16,378 (1983); S. Rep. No. 83, 98th Cong., 1st Sess. 2 (1983).

person could be prosecuted for a willful violation of the law even if he believed his actions were lawful. The 1984 committee report states, for example:

> Title VIII grants special treatment to transactions addressed by [29 U.S.C. 186(c)(4) through (9)]. These subsections contain exceptions, often technical in nature, to the prohibitions contained in [29 U.S.C. 186(a) and (b)]. *Because a person can violate a prohibition of [29 U.S.C. 186(a) and (b)] even though he proceeded in the belief that his conduct fell within the excepted behavior of [29 U.S.C. 186(c)(4) through (9)]*, title VIII adds to the "willful" requirements for this behavior the additional element that such conduct be "with intent to benefit himself or to benefit other persons whom he knows are not permitted to receive such payment, loan, money or other thing of value under subsection (c)(4) through (c)(9)."

S. Rep. No. 225, 98th Cong., 1st Sess. 298 (1983) (emphasis added).

The 1983 Senate report also expressed the concern that, without the "intent to benefit" language, one could violate Section 186 "simply because of a failure to satisfy one of the technical requirements for an exemption stated in subsections (c)(4) through (c)(9)." S. Rep. No. 83, 98th Cong., 1st Sess. 12-13 (1983). The 1983 bill did not, however, add any additional element to Section 186(d)(2) for violations of Sections 186(c)(1) through 186(c)(3). To the contrary, the committee noted that the transactions proscribed by subsections (c)(1)-(3) "are not likely to be innocently motivated. Rather, the very fact of the payment generally shows the attributes of self-dealing and abuse of position that justify the criminal

penalty." S. Rep. No. 83, *supra*, at 13. Therefore, the committee determined "not to include a specific intent requirement for prosecutions under subsection (d)(2). The mens rea requirement for prosecutions under subsection (d)(2) will continue to be 'willfully.'" *Ibid.*[15]

c. The court of appeals' conclusion that "willfully," as used in 29 U.S.C. 186(d)(2), does not require proof of specific intent to violate the law is consistent with decisions of the Second, Third, Sixth, and Ninth Circuits, all of which held, before Section 186(d) was amended in 1984, that its use of "willfully" required only proof of general intent. See *United States* v. *Cody*, 722 F.2d 1052, 1059 (2d Cir.), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United*

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[15] Petitioners Phillips and Rich state (Pet. 20 n.11) that the Department of Justice assured the Senate in 1983 that "willfully" connotes a specific intent to disobey the law. The letter relied on by petitioners, from Assistant Attorney General Robert McConnell to Senator Orrin Hatch, concerned the definition of "willfully" in a different provision, 29 U.S.C. 504. See *Labor Management Racketeering Act of 1983: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 150 (1983) (*1983 Hearing*). More pertinently, at a hearing on the 1983 Senate bill, Assistant Attorney General Lowell Jensen submitted for the record a statement that observed that, under the proposed amendments to Section 186, illegal employer payments to union officials (like the ones at issue in this case, but unlike the ones covered by subsections (c)(4)-(9)) "which are not transmitted through and used by unions, benefits plans, and cooperation committees * * * will continue to be prosecuted under Section 186 without proof of evil intent or bad motive as under current law." *1983 Hearing*, *supra*, at 104.

States v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966); *United States* v. *Carter*, 311 F.2d 934, 943 (6th Cir.), cert. denied, 373 U.S. 915 (1963).[16]

The Seventh Circuit does appear to have taken a different approach, although, as the individual petitioners appear to acknowledge (Pet. 23-24), that court's decisions are not fully consistent with one another. In *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir.), cert. denied, 368 U.S. 920 (1961), the court held that Section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." Subsequently, in *United States* v. *Keegan*, 331 F.2d 257, 262 (7th Cir.), cert. denied, 379 U.S. 828 (1964), the court held that, because the element of willfulness is satisfied by a showing of recklessness, Section 186(d) does not require proof of a specific intent

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[16] The decision below does not conflict with the Tenth Circuit's decision in *Korholz* v. *United States*, 269 F.2d 897 (1959), cert. denied, 361 U.S. 929 (1960). In that case, the Tenth Circuit upheld against a defendant's challenge a jury instruction that a person must be "either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." 269 F.2d at 903. As the court of appeals noted (Pet. App. 34a-35a n.27), the Tenth Circuit's discussion of Section 186(d) in *Korholz* is "too cryptic * * * to draw a conclusion about whether a general intent instruction would have been upheld." Moreover, the Tenth Circuit also rejected the defendants' contention that the district court should have required the jury to acquit "unless they found that the payments were made with a bad purpose or motive and without justifiable excuse," 269 F.2d at 903, relying on this Court's statement in *United States* v. *Murdock*, 290 U.S. 389, 394 (1933), that "willfully" often denotes "that which is 'intentional, or knowing, or voluntary,' as distinguished from accidental.'"

to disobey the law, but only proof that a reasonable person "would be aware that [the] conduct would likely be illegal." The court of appeals noted in this case (Pet. App. 34a-35a n.27) that such a jury instruction is "the practical equivalent of a general intent jury instruction."

More recently, in *United States* v. *Papia*, 910 F.2d 1357, 1362 (1990), the Seventh Circuit appeared to reaffirm its holding in *Inciso* that Section 186(d) requires "an awareness of or reckless disregard for § 186(d)'s restrictions." In *Papia*, however, the court upheld the trial court's jury instruction that "[a]n act is done 'willfully' if done voluntarily and intentionally with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law," against the defendant's contention that the trial court should have required the government to show that she acted with an intent to benefit herself or another. *Ibid.* (emphasis omitted). Because the court concluded that the jury was given a specific intent instruction similar to the one requested by the defendant, it did not need to decide whether Section 186(d)(2) required such an instruction. Thus, as the court of appeals noted (Pet. App. 28a n.23), the Seventh Circuit's decision in *Papia* does not address the question presented in this case.

Papia is the only appellate decision other than the decision below to consider the meaning of "willfully" in 29 U.S.C. 186(d) since it was amended in 1984. Moreover, the *Papia* court's consideration of the significance of the post-amendment statutory structure of Section 186(d) for the definition of "willfully" was limited, because one count at issue in *Papia* concerned conduct predating the 1984 amendment, and the other two counts concerned post-amendment conduct for which the government was

required to show that the defendant acted with an intent to benefit herself or another. See 910 F.2d at 1363. Unlike the court of appeals in this case, the court in *Papia* did not consider whether an interpretation of "willfully" to require specific intent would render other parts of the statute superfluous, nor did it consider the legislative history of the 1984 amendments to Section 186(d). If the issue returns to the Seventh Circuit, that court will now have the benefit of the extensive statutory analysis of the Eleventh Circuit, which is the only court of appeals to have examined the post-amendment structure of Section 186(d) in depth. Moreover, since the definition of "willfully" has been litigated in the courts of appeals only twice since 1984, there does not appear to be any pressing need for the Court to decide the issue now. Accordingly, review by this Court is not warranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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